

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

9 EVERARDO SILVA CEJA,	)	No. CV-F-08-1985 OWW
	)	(No. CR-F-03-5144 OWW)
)	
11 Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
12 vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
13 UNITED STATES OF AMERICA,	)	TO 28 U.S.C. § 2255 AND
	)	DIRECTING CLERK OF COURT TO
15 Respondent.	)	ENTER JUDGMENT FOR
	)	RESPONDENT
)	

17
18 On December 30, 2008, Petitioner Everardo Silva Ceja,
19 proceeding *in pro per*, timely filed a motion to vacate, set aside
20 or correct sentence pursuant to 28 U.S.C. § 2255.

21 A. Background.

22 On April 3, 2003, Petitioner was charged with being a felon
23 in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).
24 The Indictment alleged that:

25 defendant herein, on or about October 23,
26 2001, in the County of Fresno, State and
Eastern District of California, after having

1 been previously convicted of Discharge of a
2 Firearm at an Occupied Vehicle, in violation
3 of California Penal Code Section 244, on or
4 about July 9, 1993, in the Superior Court of
5 California, County of Fresno, Case Number
6 486174-6; Felony Spousal Abuse, in violation
7 of California Penal Code Section 273.5, on or
8 about October 16, 1997, in the Superior Court
9 of California, County of Fresno, Case Number
10 581888-5; and, Felony Battery on a Peace
11 Officer, in violation of California Penal
12 Code Section 243(c), on or about December 19,
13 1998, in the Superior Court of California,
14 County of Fresno, Case Number 615118-7,
15 crimes punishable by a term of imprisonment
16 exceeding one year, did knowingly possess a
17 firearm, to wit: a Jennings, model 38, .380
18 caliber semiautomatic pistol, and Winchester
19 .380 caliber ammunition, in and affecting
20 commerce, in that said firearm and ammunition
21 had been shipped and transported in
22 interstate and foreign commerce, in violation
23 of Title 18, United States Code, Section
24 922(g)(1).

1 Petitioner initially was represented by Thomas J.
2 Richardson. Anthony Capozzi was substituted as counsel of record
3 on June 30, 2003. While represented by Mr. Capozzi, Petitioner
4 pledaded guilty pursuant to a written Plea Agreement. The Plea
5 Agreement provided:

6 The defendant also gives up any right he may
7 have to bring a post-conviction attack on his
8 conviction or sentence. He specifically
9 agrees not to file a motion under 28 U.S.C. §
10 2255 or § 2241 attacking his conviction or
11 sentence.

12 The Plea Agreement specifically stated:

13 The defendant has read the charges against
14 him contained in the Indictment in this case,
15 and the charges have been fully explained to
16 him by counsel. Further, the defendant fully
17 understands the nature and elements of the
18 crimes [sic] with which he has been charged,
19 together with the possible defenses thereto,

1 and has discussed them with counsel.

2 The defendant understands that in order to
3 prove him guilty of the charge of being a
4 felon in possession of a firearm and
ammunition, the government must prove each of
the following elements beyond a reasonable
doubt:

5 First, the defendant knowingly possessed a
6 firearm or ammunition that had been shipped
or transported from one state to another;
7 and, Second, at the time the defendant
possessed the firearm or ammunition, the
defendant had been convicted of a crime
punishable by imprisonment for a term
exceeding one year.

10 The factual basis for Petitioner's guilty plea was set forth in
11 Exhibit A to the Plea Agreement:

12 On October 23, 2001, in the City of Fresno in
the State and Eastern District of California,
the defendant knowingly possessed a firearm,
to wit: a Jennings, model 38, .380 caliber
semiautomatic pistol, and Winchester .380
caliber ammunition, in and affecting
commerce, in that the firearm and ammunition
had been shipped and transported in
interstate and foreign commerce.

17 At the time that he possessed the firearm and
ammunition, the defendant had been previously
convicted of Discharge of a Firearm at an
Occupied Vehicle, in violation of California
Penal Code Section 246, on or about July 8,
1993, in the Superior Court of California,
County of Fresno, Case Number 486174-6;
Felony Spousal Abuse, in violation of
California Penal Code Section 273.5, on or
about October 16, 1997, in the Superior Court
of California, County of Fresno, Case Number
581888-5; and, Felony Battery on a Peace
Officer, in violation of California Penal
Code Section 243(c), on or about December 10,
1989, in the Superior Court of California,
County of Fresno, Case Number 615118-7, all
crimes punishable by a term of imprisonment
exceeding one year.

1 During the change of plea colloquy before Judge Robert E.
2 Coyle, Petitioner was placed under oath. In pertinent part, the
3 following occurred:

4 THE COURT: Mr. Rice, would you please set
5 forth the factual basis upon which the
defendant is pleading?

6 MR. RICE: Yes, Your Honor. The elements that
7 the government would have to prove in this
case would be the defendant knowingly
8 possessed a firearm or ammunition that had
been shipped or transported from one state to
another; and second, at the time the
defendant possessed the firearm or
9 ammunition, the defendant had been convicted
10 of a crime punishable by imprisonment for a
term exceeding one year.

11 To prove these elements the government would
12 introduce evidence that on October the 23rd,
13 2001, in the City of Fresno in the State and
Eastern District of California, the defendant
knowingly possessed a firearm, to wit: A
14 Jennings, model 38, .380 caliber
semiautomatic pistol, and Winchester 38
caliber ammunition, in and affecting
commerce, in that the firearm and ammunition
had been shipped and transported in
15 interstate or foreign commerce.

16 At the time that he possessed the firearm and
ammunition, he had previously been convicted
17 of discharging a firearm at an occupied
vehicle and violating the California Penal
Code Section 246 on or about July the 8th,
18 1993 in the Superior Court of California,
County of Fresno, case number 486174-6;
felony spousal abuse, in violation of
19 California Penal Code Section 273.5, on or
about October the 16th, 1997 in the Superior
Court of California, County of Fresno, case
number 581888-5; and felony battery on a
20 peace officer, in violation of California
Penal Code Section 243(c), on or about
December 10th, 1998, in the Superior Court of
California, County of Fresno, case number
21 615118-7, all crimes punishable by a term of
imprisonment exceeding one year.

1 THE COURT: Mr. Ceja, you understand that the
2 government would have to prove all of those
things as set forth by Mr. Rice beyond a
reasonable doubt?
3

4 THE DEFENDANT: Yes.
5

6 THE COURT: And remember that you're under
oath. Do you agree with all those facts as
set forth by Mr. Rice as to what you're
pleading guilty to?
7

THE DEFENDANT: Yes.
8

THE COURT: Ms. Clerk, please accept the plea.
9

MR. CAPOZZI: And judge for the record, if I
may first. The U.S. Attorney and I have
entered into an agreement that would allow us
- this case and this sentence is dependent
upon the number of convictions in the state
court. We have pulled those files in the
state court and we are now in the process of
filing writs to set aside those convictions.
Indeed, if just one is set aside, the
mandatory minimum is no longer 15 years.
We'll go by the guidelines. And indeed, if
all three are set aside, the case would be
dismissed.
10

11 The government has agreed to allow us the
opportunity to followup with those motions in
State court and allow us to continue out the
sentence to give us the time to get that
done. I just want to say that for the
record.
12

13 MR. RICE: That's correct. Basically I've
agreed to give Mr. Capozzi the time. The
only place that the priors can be litigated
at all is in State court because they're
State court convictions. And Mr. Capozzi
thinks that he has a good faith claim to set
aside one of those priors. He'll have to
bring it in State court. It would affect the
sentence in the event that one were crossed
out. But that's all that we're agreeing.
14

15 MR. CAPOZZI: We're pleading guilty.
16

17 THE COURT: All right. I understand. I just
18

1 want to be sure I understood or the record is
2 clear as to what the understanding is. Maybe
3 I misunderstood you, Mr. Capozzi. My
understanding of what you said is that if all
of these are set aside, this case would be
dismissed.

4 MR. CAPOZZI: I think the government would
5 agree with that.

6 MR. RICE: That's correct. If the State court
7 were to find that these were not valid prior
convictions and dismiss all those cases, then
the underlying felonies would go away.

8 THE COURT: All right. That's fine. I want
9 to make sure we're all on the same path.

10 MR. CAPOZZI: That's correct.

11 THE COURT: All right.

12 THE CLERK: Shall I take the plea?

13 MR. CAPOZZI: Yeah.

14 After entry of Petitioner's guilty plea, but before
15 sentencing, Roger Nuttall was substituted as counsel of record
16 for Petitioner.

17 On November 7, 2005, Mr. Nuttall, on behalf of Petitioner,
18 filed a motion to withdraw Petitioner's guilty plea on the ground
19 that Petitioner was factually innocent of violating Section
20 922(g)(1). (Doc. 46).¹ In relevant part, the motion to withdraw
21 the guilty plea asserted that "Current Counsel's investigation
22 has discovered facts which were apparently known to both of

24 ¹Mr. Nuttall also filed a motion to strike armed career
25 criminal enhancement or, in the alternative, to withdraw guilty
plea, which asserted that Petitioner's prior convictions were not
qualifying felonies (Doc. 40). This motion was denied by oral
26 order on November 16, 2005.

1 Defendant's prior counsel, but which were previously unsubmitted
2 to the court." Attached to the motion to withdraw the guilty
3 plea was the Declaration of Salvador Ceja:

4 1. I know that Everardo Silva Ceja did not
5 have knowledge that the .380 Caliber Jennings
6 handgun and bulletproof vest in question were
7 in the Grey Convertible Mustang on October
8 23, 2001;

9 2. Everardo and I (and others) periodically
10 borrowed the Grey Convertible Mustang from
11 its owner, for trips and special occasions;

12 3. When I borrowed the Mustang, I would not
13 perform an inventory search of the vehicle
14 for weapons and/or other illegal items;

15 4. On October 22, 2001, the night before
16 Everardo's arrest, I had borrowed said
17 Mustang, to entertain an acquaintance of
18 mine;

19 5. Said items belonged to this acquaintance
20 of mine, and were placed in said vehicle the
21 night before, in my presence, by said
22 acquaintance, and without Everardo's
23 knowledge;

24 6. Said other individual and I were the only
25 two people who knew that the handgun and vest
26 were in the Grey Convertible Mustang, and we
27 did not disclose this information to any
28 other person, including Everardo.

29 7. I am willing to meet with the Government
30 to disclose the identity of this
31 acquaintance, who hid handgun and vest in the
32 Mustang, and to whom said items belonged.

33 8. I told this information to both of
34 Everardo's prior attorneys, Thomas Richardson
35 and Anthony Capozzi.

36 Also attached to the motion to withdraw the guilty plea was
37 Petitioner's declaration:

38 1. On October 23, 2001, I was peacefully

1 arrested by the Fresno Police Department.
2 Without incident, I was handcuffed and
3 searched. The Police found the keys to a
Grey Convertible Mustang, which I had driven
to said location.

4 2. This Mustang was not my vehicle, and I
had borrowed it that day, from its owner.

5 3. I did not perform an inventory search of
6 this vehicle, and I was not aware that the
7 car contained a hidden .380 Caliber Jennings
handgun or bulletproof vest.

8 4. Without my consent or probable cause, the
Police officers searched the vehicle. When
9 the officers found said handgun, one of them
exclaimed, 'Bingo, A nice beautiful .380.'

10 5. Afterwards, I questioned the officers
11 about whether they were going to charge me
with possession of this handgun. They asked,
12 'Are you referring to the .22 caliber
pistol?' I responded, 'It's a .380,' because
13 I had heard the officers describe it as such.

14 Mr. Nuttall contended that "these new facts, directly contradict
15 the inference that Mr. Ceja possessed the requisite knowledge and
16 intent needed to establish a sufficient nexus between the
17 Defendant and the specific firearm involved in this case. (See,
18 e.g., U.S. v. Pahulu, (D.Utah, 2003) 274 F.Supp.2d 1235, 1240.)"

19 In opposing the motion to withdraw the guilty plea, the
20 United States presented investigation reports detailing the
21 Government's evidence against Petitioner: that agents saw
22 Petitioner, a wanted parolee, driving a car registered to his
23 father, Salvador Ceja, and his Petitioner's girlfriend, Zulema
24 Preciado; that agents saw Petitioner park the car at a
25 restaurant; that agents saw Petitioner's ex-girlfriend get out of
26 a Lincoln Navigator and meet Petitioner at his car; that an agent

1 saw Petitioner take off a dark garment and place it behind the
2 driver's seat; that an agent saw Petitioner remove an object from
3 his waist and put it in the console area of his car; and that
4 agents saw Petitioner and his ex-girlfriend enter the restaurant
5 and then leave the restaurant and return to their vehicles. The
6 agents then arrested Petitioner and found the keys to the vehicle
7 in Petitioner's pocket. The agents found a loaded .380 caliber
8 semiautomatic pistol between the driver's seat and console, a
9 bullet proof vest behind the driver's seat, and scales and drug
10 paraphernalia in the trunk. Petitioner asked the agents who is
11 going to be charged; when an agent said the .22 caliber handgun,
12 Petitioner spontaneously responded "that's a .380." Petitioner's
13 ex-girlfriend told the agents that when she met Petitioner at his
14 car, Petitioner took off the bullet proof vest and put it behind
15 the driver's seat; that Petitioner had the gun tucked in the
16 right side of the waist band of his pants; that she told
17 Petitioner she did not want him to bring the gun into the
18 restaurant and asked him why he wanted to bring it with him; that
19 Petitioner told her that people were after him and owed him
20 money; and that she saw Petitioner remove the gun from his
21 waistband and place it between the driver's seat and the console.
22 Attached to the Government's opposition is report prepared by the
23 Fresno County District Attorney, Bureau of Investigations,
24 Investigative Report executed by Investigator Tom Flanigan on
25 August 29, 2002, which stated:

26 In regard to the 2001 Ford Mustang, Cal. Lic.

1 #4TUJ279 (r/o Preciado, Zulema or Ceja,
2 Salvador, 1194 E. San Ramon, Fresno, CA.), I
3 was able to determine that registered owner
4 Preciado was the defendants [sic] girlfriend,
5 while Salvador Ceja is the defendants [sic]
6 father. I was able to determine that Zulema
7 Preciado had recently been residing at 5376
N. Valentine, #201, Fresno, however, she had
recently moved to an unknown location in
Sacramento. I was able to determine that Mr.
Salvador Ceja works for Attorney Thomas J.
Richardson at 2950 Mariposa Street in Fresno.

8 On 08/29/02, at 1300 hours, I contacted Mr.
9 Salvador Ceja at his business address. I
told Mr. Ceja that I wanted to ask him if his
son (defendant Everardo) had permission to
use the Mustang on 10/23/01, and also if Mr.
10 Salvador Ceja had any knowledge of the stolen
11 .380 pistol which was found in the Mustang.
12 Mr. Salvador Ceja politely explained prior to
13 talking to me that he wished to confir [sic]
with his employer Mr. Richardson. I served
Mr. Salvador Ceja with a subpoena regarding
this case.

14 In the reply brief in support of the motion to withdraw the
15 guilty plea, Mr. Nuttall submitted another declaration by
16 Salvador Ceja:

17 1. That on or about August 29, 2002, I was
18 contacted by Fresno County District Attorney
19 Investigator Flanigan, who questioned me
concerning the activity of my son, Everardo
20 Silva Ceja, on or about October 23, 2001.
Specifically, he asked me if I had knowledge
of whether Everardo had permission to use the
Mustang, and whether I had knowledge of the
.380 pistol which had been found in said
21 Mustang.

22 2. That on that date, August 29, 2002, I did
23 have knowledge that Everardo did, have
24 permission to use the Mustang on October 23,
2001;

25 3. That on August 29, 2002, I did have
26 knowledge that the .380 caliber pistol, which
was found in the Mustang, did not belong to

1 Everardo, but in fact truly belonged to
2 another person, who had left said pistol in
3 the vehicle the night before;

4 4. That when Detective [sic] Flanigan
5 interviewed me, I asked to continue the
6 interview, so that I could confer with my
7 employer, and Everardo's attorney, Thomas J.
8 Richardson, Esq.;

9 5. That thereafter, I spoke with Mr.
10 Richardson concerning these matters, and Mr.
11 Richardson advised me that I should not
12 disclose this information to Investigator
13 Flanigan; and

14 6. That I have been willing to disclose this
15 information to the government, and that I
16 would have earlier disclosed this
17 information, but for the advice of Mr.
18 Richardson.

19 A hearing on this motion to withdraw Petitioner's guilty
20 plea was held on November 22, 2005 at which the following
21 occurred:

22 THE COURT: Have you now had sufficient time,
23 Mr. Nuttall, to confer with your client and
24 to enable him to determine what is in his
25 best interests?

26 MR. NUTTALL: Yes, I have. Just for the
27 record, Your Honor, I did, in that process, I
28 made a request. Since I came in late in the
29 case and made a request, actually yesterday,
30 to Mr. Rice to - concerning certain aspects
31 of the current charge that I was not clear
32 about. And I appreciate, he was very
33 responsive in light of the time frame here.
34 And I received that today and spent some time
35 with it. My advice to my client is that we
36 withdraw the motion to withdraw the plea. He
37 agrees with me. And so we do withdraw that
38 motion.

39 THE COURT: All right. Mr. Ceja, have you
40 heard the statements of your attorney, Mr.
41 Nuttall?

1 THE DEFENDANT: Yes.

2 THE COURT: And have you had a chance to
3 analyze this decision?

4 THE DEFENDANT: Yes.

5 THE COURT: And after having consulted with
6 your attorney, do you agree with his action
7 in determining that your motion to withdraw
8 your guilty plea in this case - because I
9 have said I would afford you a fair trial and
I'm certainly willing to provide you with a
jury trial, to determine whether or not these
elements of the crime can be proved beyond a
reasonable doubt - that it is in your best
interest to proceed to withdraw that motion?

10 THE DEFENDANT: Yes.

11 The Court then proceeded with sentencing. At sentencing,
12 Petitioner's mother, Endina Silva Garcia Ceja spoke:

13 MRS. CEJA: First of all, judge, thank you
14 very much for letting me speak. And second,
I would like to ask you to give me an
opportunity so that my son not be sentenced
because, in fact, he is not guilty. He had
no knowledge of the weapons that were in the
car. First of all, the car was not his.

17 And the first attorney we had, we tried to
18 explain that to him all the time, but he kept
saying that that was not necessary. He said
19 that that was not necessary, that he was
going to take care of everything without the
need to clarify things.

21 And also, please, I just don't want him to go
before a jury because I just don't trust that
system too much. And because first of all,
we're Hispanics and he has been to the point
where he was almost deported. And Mr. Thomas
Richardson, we kept telling him that all the
time. And that he was from here. And he
just doesn't listen to that because every
once in a while, he would ask us again, 'What
place in Mexico was your son born?' And that
just made no sense because we have known him
for quite a while.

1 THE COURT: Your son was born in the United
2 States and is a citizen of the United States.
3

4 MS. CEJA: Yes. And also, it's just that,
5 well, I'd like you to know, well, it's not
6 our fault. And I know you're not at fault
7 either because the first attorney that we had
8 for two years, he was not doing anything at
9 all. He was just lying to us. We didn't
10 discover that, you know, until two years
11 afterwards.

12 And then we hired the second attorney, Mr.
13 Anthony Capozzi, and he said, well, I'll take
14 care of everything in six or seven months.
15 And then it was almost a year. Time had gone
16 by. And then we talked to him, you know, as
17 to when he was going to take care of things.
18 Only just a few days we're going to take care
19 of things. And not until maybe another year
20 went by and nothing was done. Not until we
21 got this present attorney, the one who's
22 helping us out right now.

23 And also this present attorney, we've told
24 him that our son has nothing to do with it.
25 That my son, that he's not guilty of this.
26 That he didn't know anything about the gun or
27 anything else that was in the car. That he -
28 there's no reason that he should have to pay
29 for something that he did not do because he
30 didn't know anything about this.

31 And then - and then he said, well, he should
32 plead guilty - the - Mr. Capozzi said that,
33 he should, he said, and then I'll take care
34 of everything. But now that he pled guilty,
35 he's trapped. He's trapped into this and
36 something - for something he did not do.

37 And I just don't want for it to be the case
38 that maybe years later, we found out, okay,
39 well, now it comes out that he was innocent
40 because we know we have the evidence that he
41 had nothing to do with this at all.

42 Because we've tried to prove it to the other
43 two, the other two attorneys that we had,
44 that the weapons, that he had nothing to do
45 with that. Or anything to do with the car.
46 He had nothing to do with that.

1 And then the attorney, Roger Nuttall, he is
2 aware of all this and he did pay attention as
3 far as all this. Although he did tell us
from the beginning that he was very busy, but
that he was going to try and help us as best
he could.
4

5 And judge, I really appreciate your patience
6 as well as the District Attorney's [sic]
because I just don't want him to be
7 sentenced. I don't want him to go to a jury
- I mean, a trial before a jury because I
just don't want that. Because in the future,
8 if you find out that he's not guilty, also of
all the other cases in the past, that way we
were trying to avoid for him being sentenced
to like 15 years in prison. We're trying to
9 save him from all those things that he's
facing.
10

11 If it's possible that it can be done. I
believe it's in your hands.
12
13 ...
14

15 THE COURT: I will explain to you what my
understanding of the status of our
proceedings are so that you will know what
the law is.

16 I have offered to permit your son to have a
trial before a jury and I guarantee you it
will be a fair trial.
17

18 MRS. CEJA: Really, I just don't - I -
truthfully, I just don't want that because
what I have seen recently is that there's
some that they have been convicted by juries
and some that have even died and then it
comes out later that they were innocent. I
just don't want that.
19

20 THE COURT: I understand your concern. But I
believe that our jury would be representative
in this district. There would be Hispanic
individuals on our jury. And we would have a
fair trial.
21

22 The law concerning this matter of the
agreement that your son has made with the
23 government, and with regard to his prior
24

1 convictions, is one that has to be addressed
2 in the correct sequence. In other words, the
3 correct legal steps must be taken to attack,
4 if they can be legally attacked, his prior
5 convictions and that is something that cannot
6 start in this court. It has to start in the
7 courts where your son was convicted
8 originally. And those are state courts.
9 That is a different legal system from the
10 United States justice system. You are now in
11 a United States court.

12 The choice in this court is either an
13 agreement to accept responsibility and plead
14 to the crime, reserving all other legal
15 rights that exist, to try to attack the prior
16 convictions and to show any other basis for
17 upsetting the sentence that is recommended by
18 the probation officer and seems to be called
19 for under the law. Assuming the truth of the
20 charges.

21 Otherwise, the alternative is to test the
22 charges before a jury and to determine
23 whether the elements of those charges can be
24 proved beyond a reasonable doubt under the
25 law. And that right is available to your
26 son. And I will afford him that right and,
 again, I state to you that the trial will be
 fair.

27 And I can tell you that the prosecutor in
28 this case is an honest and an honorable man.
29 Your attorney is one of the best attorneys
30 who appear in this court and has the ability,
31 the wisdom, the experience to do his best for
32 your son in this case.

33 And so he, meaning your son, does have the
34 right and even though he's entered his plea,
35 I think there are enough circumstances
36 because it was a different attorney and
37 because the analysis that was presented that
38 I've seen in the lower courts does not
39 include everything that Mr. Nuttall has now
40 raised and apparently you and your son and
41 others of your family have provided. But I
42 can't comment on the merits of that because
43 that isn't before me today to decide. My
44 only alternative, as I have stated and I'll
45 state them again so you can understand, is

1 either we have a trial - Mr. Rice is ready to
2 have a trial. He will bring the evidence he
3 has and that evidence may be tested, may be
challenged. And then we would have a jury
decide the truth.

4 Or, if, as Mr. Nuttall has stated, to lower
5 the risk that your son faces because of the
6 prior convictions and because of the nature
7 of the offense charged in this case, he would
have at least a finite exposure, meaning he
would know what his sentence is going to be
and then he can take the steps that the law
provides he may take, through Mr. Nuttall, to
try to affect that result by either
overturning the State convictions or doing
whatever else would be available. And I
can't speak to that because I can't give
legal advice.

11 But those are really the choices that are
available unless Mr. Nuttall suggests
12 something else. And I don't see any other
alternatives. None have been suggested under
13 the law. Do you understand what I've said?

14 MRS. CEJA: Well, there are certain things
that I need to understand and there are
15 others that I would need more time for my
attorney - well, for the attorney to be able
16 to take more time to explain to me. But also
- but if you could give me more time, that
maybe until after the first or, you know,
after Christmas time, because, you know, that
way we can really be more conscious as to
17 what's going on. Because, you know, there's
18 just so many things going on right now, you
know, all these holidays that are coming up.
That way we could know exactly what we're
20 going to be doing.

21 THE COURT: Well, I don't know what else there
22 is to -

23 MR. NUTTALL: Let me, if I may, address. I
think what - what needs to be addressed. If
24 that would be all right.

25 THE COURT: Yes.

26 MR. NUTTALL: Your Honor, what they're talking

1 about - and just so the record is clear. I
2 appreciate the Court's comments here and
3 listening so attentively to Mrs. Ceja. Much
appreciated. We had talked - I'm aware - let
me make it clear.

4 For the record, we have withdrawn our motion
5 to withdraw the plea. We're not seeking a
trial. I appreciate the Court's indication
that we can have one. My advice to my client
is to proceed to sentencing.

7 Ultimately, at the time of sentencing today,
we're going to - I'd like to make a request
8 that the Court actually, once sentence is
imposed, stay imposition or execution or the
9 transfer for 90 to 150 days so that we can
facilitate the work that we need to do to
10 collaterally attack the prior convictions
without having to travel a great distance to
11 do that.

12 ...

13 THE COURT: I'd be willing to let Mr. Ceja
stay here while you pursued the habeas
14 remedies if the law permits it.

15 MR. NUTTALL: That would be fine. So I think
with that, we can proceed. We can have a bit
16 of time to work on that.

17 During the sentencing elocution, Petitioner stated:

18 THE DEFENDANT: I never signed for these 15
years. If Mr. Capozzi would have never
19 promised me that he was going to get some of
my priors -

20 THE COURT: Set aside.

21 THE DEFENDANT: Yeah. Because if I was truly
guilty, I would have accepted the four years
in the state, of course, and I would have
been home by now. So I didn't do that. And
22 Mr. Capozzi told me don't worry about it,
he'll have me out of here in six, seven
months. And that's the only reason I signed
23 for the 15.

24 THE COURT: All right. It sounds to me as if

1 we don't have a voluntary plea.

2 MR. RICE: It doesn't matter to me. If he
3 wants a trial, I'll give him a trial.

4 THE COURT: I'm - but I'm sufficiently
5 concerned that I think we're just inviting
6 catastrophe here, Mr. Nuttall. Mr. Ceja, you
know, says he's not guilty, that he was in
effect misled or simply did not understand
Mr. Capozzi's advice.

7 Mr. Capozzi - and it's being represented to
8 me, and it's said in his declaration, that he
would not face the sentence, the mandatory
minimum 15 year sentence in this court that
he is facing, and that he could - as I
interpret it, the language of Mr. Capozzi,
Mr. Ceja could be assured that one or more of
the priors were going to be set aside. And
that's the only reason he took this deal
because he didn't think he'd be doing any
time as his declaration says.

13 And so I think that under the totality of the
14 circumstances, that I - I know that we're in
the middle of sentencing, but I think we're
going to have to go back to your motion to
withdraw the plea because what I'm doing is
I've heard these rounds [sic] stated again by
your client. Now, Mr. Capozzi isn't here
obviously, but I sense that we would be, I
think, on legally firmer ground all around
here if we try this case. I don't really see
that we have an alternative.

19 THE DEFENDANT: I'm accepting the plea. I
20 just want the chance for Mr. Nuttall to fight
my State priors and have a chance to we can
talk before I get transferred.

21 THE COURT: Well, I've already said as long as
22 the law permits that, I'm -

23 THE DEFENDANT: That's all I want.

24 THE COURT: I'll permit you to stay here and
25 -

26 THE DEFENDANT: I just don't want to have to
get more than the 15 years.

1 THE COURT: I understand.

2 THE DEFENDANT: That's all I'm worried about.

3 MR. RICE: I guess that's really the problem.
4 If he does go to trial, I will seek 27 to 34
years.

5 THE COURT: Right. That's understood. We all
6 know that. But I just heard Mr. Ceja say
that he's accepting the plea.

7 MR. NUTTALL: Yes.

8 THE COURT: And so I want to be - I want to be
9 clear as to - because I don't want you to be
in the position, Mr. Ceja, where you think
that anybody's promised you anything and then
you don't get it and your going to feel
you've been betrayed.

11 THE DEFENDANT: Well, I feel ... confident
12 that Mr. Nuttall is going to take care -

13 THE COURT: He'll do the best he can. And he
14 certainly is a competent attorney. He has
the ability - if the law will support it and
the facts support it, he has the ability to
15 do the job.

16 All right. So you understand that if we go
17 forward with the sentencing now today and you
18 accept the plea, that that avenue is - unless
the higher court says that there's a basis to
set it aside or overturn it, that avenue will
be foreclosed. You understand?

19 THE DEFENDANT: Yeah.

20 THE COURT: And are you willing to proceed
21 today with sentencing? Is this your
22 voluntary choice, having been fully informed
by Mr. Nuttall as to the risks?

23 THE DEFENDANT: Yes.

24 THE COURT: All right. Do you wish to say
25 anything else, Mr. Ceja?

26 THE DEFENDANT: That's it. Thank you. Both
of you, Mr. Rice.

1 ...

2 THE COURT: ... All right. Is there any legal
3 cause why sentence should not now be
3 pronounced?

4 MR. NUTTALL: - no, Your Honor.

5 Petitioner was sentenced on November 22, 2005 to 180 months
6 incarceration and a 60 month term of supervised release. By
7 Orders filed on March 6, 2006, the transfer of Petitioner from
8 the Fresno County Jail to a Federal Institution was stayed
9 through April 28, 2006 while Petitioner's counsel collaterally
10 attacked Petitioner's prior state convictions.

11 Petitioner appealed his conviction and sentence and the
12 Ninth Circuit affirmed.²

13 B. GROUND FOR SECTION 2255 MOTION.

14 As grounds for relief, Petitioner asserts:

15 B. Petitioner for the first time in this
16 habeas corpus petition 28 U.S.C. § 2255 is
17 attacking his plea to the 'possession' of a
18 firearm charge on the ground that the plea
19 was not supported by an adequate factual
20 record. In this habeas corpus petitioner
21 claims factual and legal innocence. In
22 summary, petitioner posits that he was never
23 informed by Judge Coyle, at the plea hearing,
24 that it was an essential element of the
25 offense that petitioner must have had
26 knowledge of the presence of the weapon prior
27 to or during the possession in order to
28 satisfy the element of the offense.

29 ²In the Plea Agreement Petitioner waived his right to appeal
30 as long as his sentence was consistent with the agreement.
31 Although Petitioner was sentenced in accordance with the Plea
32 Agreement, Mr. Nuttall requested and Mr. Rice agreed that
33 Petitioner could appeal whether the three prior convictions
34 constitute categorical crimes of violence within the meaning of the
35 armed career criminal enhancement.

1 C. Petitioner, therefore, argues that the
2 hearing court did not adequately advise him
3 of the exact nature of the § 924(e) charge,
4 the guilty plea was not knowing and voluntary
was required by due process, and the hearing
court did not have a legally sufficient
factual basis for accepting the guilty plea.

5 D. Petitioner was unaware of the presence of
6 a weapon at any stage of which the offense
7 conduct was based. His knowledge of the
8 presence of the weapon was not until after
9 his arrest. Petitioner in deciding to plead
10 guilty did so with the (incorrect)
11 understanding that he was guilty of the
12 offense, by simply being in the borrowed
13 vehicle that he was driving on the day of his
arrest. Thus, he was pleading guilty and
simultaneously denying culpability. The
record will conclusively demonstrate same.
(See Exhibit 'E' pg. 17 [Transcript of
November 22, 2005 hearing on Petitioner's
motion to withdraw guilty plea and
sentencing]).

Petitioner contends that his guilty plea to possession of the
firearm was not knowing, intelligent, and voluntary "because: (1)
He was misinformed as to the factual basis for a § 924(e) (1)
violation, and (2) He was hobbled by the ineffective assistance
of counsel, Thomas J. Richardson and Anthony Capozzi during
pretrial proceeding; during plea negotiations and at the plea
hearing."

Petitioner's motion is supported by the Declaration of
Salvador Ceja executed on December 12, 2008:

[O]n October 23, 2001 Everardo Silva Ceja did
not had [sic] any knowledge that the .380
caliber Jennings handgun and bulletproof vest
in question were in the Grey Convertible Ford
Mustang he had borrowed in [sic] that day of
his arrest. I Salvador Ceja and Efren Gayton
had the gun in the car and we were the only
two persons who knew about the gun in

1 question being in the vehicle because Efren
2 put it there on October 22, 2001 in my
3 presence the night before Everardo's arrest
4 because we were working together that
5 evening. The night before Everardo's arrest
6 I, Salvador Ceja was driving the said Ford
7 Mustang because I was performing a very, very
8 dangerous investigation for the government
9 and for that reason it was very important for
10 our own safety to have the gun with us. I
11 know that it is against the law to carry an
12 unregistered weapon, but in this case I
13 decided to take the risk to be punished by
14 the law for carrying an unregistered gun
15 rather than being murdered by those outlaws
16 [sic] members of the Millenium [sic] Drug
17 Cartel. Fortunately I was not punished, I
18 was not murdered either, but yes, I was
19 seriously hurt by the government for
20 punishing a member of my family without
21 having any fault. The investigation that I
22 was performing for the government was
23 regarding a homicide of four people in
24 Chicago, Illinois in which Efren's brother
25 Jose Luis Gayton who was also my godson was
one of the victims who was brutally murdered
there. I worked in this investigation for
approximately 3 years until I discovered
those who were the persons in charge in
committing this horrible crime. The persons
in charge were the most fearsome and
bloodthirsty gunmen of the most dangerous
drug cartel in Mexico. 'The Millenium [sic]
Drug Cartel of the Valencia Brothers.' I
gave this information to all three of
Everardo's prior attorneys, Thomas J.
Richardson, Anthony Capozzi and Mr. Roger T.
Nuttall. At the evidentiary hearing I will
take this same information to the judge but
with all the proofs to demonstrate that what
I declare here is true. Furthermore, I tried
to speak with the prosecutor by means of Mr.
Roger T. Nuttall to clarify as to who put the
gun in the car in [sic] October 22 [sic],
2001, and who knew that the gun was there.
Unfortunately all my attempts were useless
because the prosecutor refused to speak to me
because according to him I was not credible.
I do not explain myself as to why the
prosecutor could judge me before speaking
with me. I cannot believe that he said that

1 my declaration was lacking of [sic]
2 credibility, without earlier knowing if it is
3 truth or not about what I wanted to speak
4 about. But at the evidentiary hearing I am
5 going to present indisputable evidence to
6 prove that my declaration does not lack
7 credibility. Finally, I look forward to
8 meeting with the prosecutor and or any
9 government Agent of his choice for
10 questioning regarding the gun in question
11 from the October 23, 2201 incident in which
12 an innocent person was wrongfully condemned
13 for a crime that he did not commit. I am
14 ready for any questioner. For more details
15 with regard to my declaration you can contact
16 FPD Detective Carlos Leal at (559) 696-1656
17 and, or [sic] FBI Agent Sunny Santiago at
18 (559) 436-4474. They will provide the
19 necessary evidence to show that my
20 declaration is credible.

1 1. Failure to Comply with Rule 11.

2 "To establish a violation of § 922(g)(1), the government
3 must prove three elements beyond a reasonable doubt: (1) that the
4 defendant was a convicted felon; (2) that the defendant was in
5 knowing possession of a firearm; and (3) that the firearm was in
6 or affecting interstate commerce." *United States v. Beasley*, 346
7 F.3d 930, 934 (9th Cir.2003), cert. denied, 542 U.S. 921 (2004).
8 "To establish that a defendant acted 'knowingly,' the prosecution
9 need not prove that the defendant knew that his possession of a
10 firearm was unlawful; the prosecution need only prove that the
11 defendant consciously possessed what he knew to be a firearm."
12 *Id.*

13 Rule 11(b)(1)(G), Federal Rules of Criminal Procedure,
14 provides that, during the change of plea colloquy, the Court must
15 advise the defendant of "the nature of the charge to which the
16

1 defendant is pleading." Rule 11(b)(3) requires that, "[b]efore
2 entering judgment on a guilty plea, the court must determine that
3 there is a factual basis for the plea."

4 "For a section 2255 movant to successfully challenge a
5 guilty plea based upon a violation of Rule 11, he must establish
6 that the violation amounted to a jurisdictional or constitutional
7 error or that the violation resulted in a complete miscarriage of
8 justice or in a proceeding inconsistent with the demands of fair
9 procedure." *United States v. Grewal*, 825 F.2d 220, 222 (9th
10 Cir.1987); *United States v. Timmreck*, 441 U.S. 780, 783-785
11 (1979) (technical violations of Rule 11 will not support
12 collateral relief). "He must also establish that he was
13 prejudiced in that he was unaware of the consequences of his
14 plea, and, if properly advised, would not have pleaded guilty."

15 *Id.*

16 Assuming arguendo that the Rule 11 colloquy did not satisfy
17 the requirements of Rule 11(b)(1)(G) and (b)(3), Petitioner
18 cannot establish that, had he known that knowing possession of a
19 firearm required proof that he consciously possessed what he knew
20 to be a firearm, he would not have pleaded guilty. Mr. Nuttall
21 moved to withdraw the guilty plea based on Petitioner's
22 contention that he did not know the weapon was in the vehicle,
23 presented declarations in support of that contention, and that he
24 was actually innocent of violating Section 922(g). The motion to
25 withdraw the guilty plea was fully briefed and set for hearing.
26 Petitioner withdrew the motion to withdraw the guilty plea

despite repeated assurances from the United States and the Court that Petitioner could withdraw his guilty plea and proceed to trial. The Court twice offered the opportunity to Petitioner to proceed to trial based on his claim that he did not knowingly possess the firearm. At the sentencing hearing, Petitioner's mother again asserted that Petitioner did not know the gun was in the car and, again, the Court and the United States advised Petitioner he would then be allowed to withdraw the guilty plea and proceed to trial. Petitioner stated that he did not want to undergo the risk of trial and insisted on maintaining his guilty plea.

2. Ineffective Assistance of Counsel.

Petitioner contends that he was denied the effective assistance of counsel because of counsel's failure to advise him that proof of knowing possession for purposes of Section 922(g) required proof that he consciously possessed what he knew to be a firearm.

To establish an ineffective assistance of counsel claim, Petitioner must show: (1) the representation was deficient, falling "below an objective standard of reasonableness"; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Court need not evaluate both prongs of the *Strickland* test if the petitioner fails to establish one or the other. *Strickland*, *id.* at 697; *Thomas v. Borg*, 159 F.3d 1147, 1152 (9th Cir.1998), cert. denied, 526 U.S. 1055 (1999).

Under the first prong, Petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct of counsel's performance at the time." *Id.* at 689. The proper inquiry is whether, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."

Id. The court must apply "a heavy measure of deference to counsel's judgments," and "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 690-691. "The relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir.1988). "The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel." *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.1989). A decision to waive an issue where there is little or no likelihood of success and concentrate on other issues is indicative of competence, not

1 ineffectiveness. See *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th
2 Cir.1989).

3 To meet the prejudice requirement, the petitioner must
4 demonstrate that errors "actually had an adverse effect on the
5 defense." *Strickland*, 466 U.S. at 693. "It is [also] not enough
6 for the defendant to show that the errors had some conceivable
7 effect on the outcome of the proceeding." *Id.* "Virtually every
8 act or omission of counsel would meet that test, and not every
9 error that conceivably could have influenced the outcome
10 undermines the reliability of the result of the proceeding." *Id.*
11 "The defendant must show that there is a reasonable probability
12 that, but for counsel's unprofessional errors, the result of the
13 proceeding would have been different. A reasonable probability
14 is a probability sufficient to undermine confidence in the
15 outcome. *Id.* at 694. Where a petitioner enters a guilty plea
16 upon the advice of counsel, the voluntariness of the plea depends
17 upon whether the petitioner received effective assistance of
18 counsel. In order to prevail on an ineffective assistance of
19 counsel claim, "the [petitioner] must show that there is a
20 reasonable probability that, but for counsel's errors, he would
21 not have pleaded guilty and would have insisted on going to
22 trial." *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985).

23 Petitioner's claim of ineffective assistance of counsel
24 fails on the prejudice prong. Petitioner cannot demonstrate
25 that, but for counsel's errors, he would not have pleaded guilty
26 and would have insisted on going to trial. Mr. Nuttall moved to

1 withdraw the guilty plea based on Petitioner's contention that he
2 did not know the weapon was in the vehicle, presented
3 declarations in support of that contention, and argued that
4 Petitioner was actually innocent of violating Section 922(g).
5 The motion to withdraw the guilty plea was fully briefed and set
6 for hearing. Counsel properly presented the facts that supported
7 his alleged claim of actual innocence. Based on this proffer,
8 the Court offered to set aside the plea and proceed to trial.
9 Petitioner withdrew the motion to withdraw the guilty plea,
10 despite repeated assurances from the United States and the Court
11 that Petitioner's motion to withdraw his guilty plea would be
12 granted and he could proceed to trial. At the sentencing
13 hearing, Petitioner's mother again asserted that Petitioner did
14 not know the gun was in the car and, again, the Court and the
15 United States stated that Petitioner would be allowed to withdraw
16 the guilty plea and proceed to trial. Petitioner then stated in
17 open court that he accepted the guilty plea.³

18 CONCLUSION

19 For the reasons stated:

20 1. Petitioner Everardo Silva Ceja's motion to vacate, set

21 ³Petitioner's motion contains a lengthy discussion of the
22 sufficiency of the Government's evidence, including claims that one
23 of the police reports was fabricated, and of his father's
24 declaration and demands an evidentiary hearing on the issue of his
25 actual innocence. Petitioner's discussion of the sufficiency of
26 the Government's evidence is irrelevant to the resolution of his
Section 2255 motion because Petitioner pleaded guilty and cannot
demonstrate a basis for setting aside his guilty plea through his
Section 2255 motion. For the same reason, Petitioner is not
entitled to an evidentiary hearing.

1 aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;

2 2. The Clerk of the Court is directed to ENTER JUDGMENT FOR
3 RESPONDENT.

4 IT IS SO ORDERED.

5 Dated: January 9, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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